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IN THE

Supreme Court of the United States

PETE GEREN, SECRETARY OF THE ARMY, ET AL.
Petitioners,

v.

SANDRA K. OMAR & AHMED S. OMAR,
AS NEXT FRIENDS OF SHAWQI AHMAD OMAR
Respondents.

MOHAMMED MUNAF, ET AL.
Petitioners,

v.

PETE GEREN, SECRETARY OF THE ARMY, ET AL.
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE ASSOCIATED PRESS, THE COMMITTEE TO PROTECT JOURNALISTS, THE INTERNATIONAL FEDERATION OF JOURNALISTS, PEN AMERICAN CENTER, AND THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS IN *MUNAF v. GEREN*, No. 06-1666, AND IN SUPPORT OF RESPONDENTS IN *GEREN v. OMAR*, No. 07-394

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INTEREST OF *AMICI CURIAE*

The Associated Press ("AP") is the essential global news network, delivering fast, unbiased news from every corner of the world to all media platforms and formats. Founded in 1846, AP today is the largest and most trusted source of independent news and information. On any given day, more than half the world's population sees news from AP.

The Committee to Protect Journalists ("CPJ") is an independent, non-profit organization that promotes press freedom worldwide by defending the right of journalists to report the news without fear of reprisal.

The International Federation of Journalists ("IFJ") is the world's largest organization of journalists, representing around 600,000 members in 120 countries. The IFJ promotes international action to defend press freedom and social justice through strong, free, and independent trade unions of journalists.

PEN American Center ("PEN") is a human rights and literary association based in New York. Committed to the advancement of literature and the unimpeded flow of ideas and information, PEN fights for freedom of expression; advocates on behalf of

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. Letters of consent from the parties have been submitted to the Clerk's office along with this brief.

writers harassed, imprisoned, and sometimes killed for their views; and fosters international exchanges, dialogues, discussions, and debates.

The Reporters Committee for Freedom of the Press (the "Reporters Committee") is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance, and research in First Amendment and freedom of information litigation in state and federal courts since 1970.

INTRODUCTION AND SUMMARY

In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), a coalition of humanitarian organizations and associations of international journalists filed an *amicus* brief in support of petitioner Yaser Hamdi, arguing that "[g]iven the conditions in which relief workers and journalists are forced to operate, they face a real risk of mistaken or ill-founded military detention." *Br. for AmeriCares, et al., Hamdi v. Rumsfeld*, 542 U.S. 547 (2004) (No. 03-6696) *available at* 2004 WL 575744, at *13. Citing that brief, this Court's plurality opinion in *Hamdi* noted that "the risk of erroneous deprivation of a citizen's liberty in the absence of sufficient process here is very real," and held that due process requires, at a minimum, a hearing before a neutral decisionmaker at which "the errant tourist, embedded journalist, or local aid worker has a chance to prove military error." *Hamdi*, 542 U.S. at 530, 534 (plurality opinion).

Amici in this case are media organizations, international journalist associations, and non-governmental organizations dedicated to freedom of the press. Although *Geren v. Omar* and *Munaf v. Geren* arise in a different legal context than *Hamdi*, the practical implications of the Executive's assertion of unreviewable detention authority are the same. Journalists and other civilians are routinely present in areas of military conflict. Indeed, military protocols recognize that journalists will often be on the ground before troops arrive. Similarly, the Geneva Conventions anticipate that journalists will be on or near the battlefield and provide those journalists with protections as civilians or prisoners of war. Reporters and war correspondents thus face a substantial risk of being detained erroneously in the course of executing their professional responsibilities.

The ongoing conflict in Iraq demonstrates that such erroneous detentions are not merely a hypothetical possibility. More journalists have died in the course of carrying out their professional duties in Iraq than during any conflict in the 20th Century. While insurgents, kidnappers, and masked gunmen are largely responsible for the dangers that journalists confront in Iraq, the journalists also face significant risks as a result of mistaken identity. In the fog of war, U.S. troops have sometimes confused journalists with Iraqi insurgents. U.S. forces have detained over a dozen journalists for months at a time without any charges. Many more journalists and media support workers have been detained

without charges for shorter intervals and then released.

In *Hamdi*, this Court recognized the substantial risk of erroneous detention and insisted on due-process protections to preserve "core rights to challenge meaningfully the Government's case and to be heard by an impartial adjudicator." *Hamdi*, 542 U.S. at 535 (plurality opinion). Yet the government's interpretation of *Hirota v. MacArthur*, 338 U.S. 197 (1948), would eviscerate *Hamdi* and insulate many, if not most, of the military's future detention activities from any judicial review. The government's concerns about deference to military operations and international comity can and should be taken into account in fashioning the scope of the relief available to detainees, but these policy concerns should not be engrafted onto Article III as a rigid jurisdictional bar. A system of unchecked and unreviewable detention would have devastating consequences for the many journalists and other civilians in Iraq and in future areas of military conflict.

ARGUMENT

I. Journalists and War Correspondents Are Routinely Present in Areas of Military Conflict.

As a fixture of modern warfare, journalists and war correspondents will often be present in a foreign theater of war without being "part of or supporting forces hostile to the United States or coalition partners." *Hamdi*, 542 U.S. at 527 (plurality opinion) (quotation marks omitted). The government's claims of unreviewable authority to

detain and punish will have dangerous implications for these journalists reporting from Iraq and from future areas of conflict.

Journalists have reported directly from the battlefield since at least the Crimean War in 1853.[2] By 1909, war correspondents had become such a regular presence in war zones that the regulations annexed to the Hague Conventions incorporated special provisions ensuring their safety.[3] During World War II, about 150 war correspondents landed in Normandy to cover the Allied Forces' D-Day

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[2] *See generally* Philip Knightley, *The First Casualty—The War Correspondent as Hero & Myth-Maker from the Crimea to Iraq* (2004).

[3] *See* Hague Regulations Respecting the Laws and Customs of War on Land, art. 13, Annex to Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907 (providing that "newspaper correspondents and reporters . . . are entitled to be treated as prisoners of war, provided they are in possession of a certificate from the military authorities of the army which they were accompanying"). In their current form, the protections for war correspondents are codified in Article 4 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War Aug. 12, 1949, [1955] 6 U.S.T. 3316, T.I.A.S. No. 3364 ("Third Geneva Convention"), which protects all authorized war correspondents as prisoners of war, whether or not the correspondent actually possesses an authorization card at the time of capture. Journalists who are unaffiliated with a particular nation's armed forces are protected as civilians under Common Article 3 of the Geneva Conventions and under separate provisions in Additional Protocol I to the Geneva Conventions of 12 August 1949 (1977) ("Protocol 1").

invasion in 1944.[4] For the invasion of Iraq in 2003, that number ballooned to 600 journalists, who worked as embedded reporters with Multi-National Force ("MNF") troops on behalf of a diverse range of American and international news organizations.[5] An additional 1,445 journalists worked as "unilaterals" traveling on their own and working without any affiliation with MNF troops.[6]

By reporting from the frontlines, these journalists put their lives at risk to serve important public interests. Battlefield journalists provide the public with the information they need to engage in the "'uninhibited, robust, and wide-open'" debate and discussion contemplated by the First Amendment. *Lamont v. Postmaster Gen. of the U.S.*, 381 U.S. 301, 307 (1965) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). The public relies on prompt and accurate war reporting to apprise them of events unfolding half a world away and to inform them about the actions that the military takes in their name. "Military legal obligations include accountability to the civilian leadership and protection of the Constitution, including the First Amendment. Press coverage of military operations

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[4] *See* Army Field Manual 46-1, *Public Affairs Operations* 24 (1997), *available at* http://www.globalsecurity.org/military/library/policy/army/fm/46-1/46_1.pdf.

[5] Christopher Paul & James J. Kim, RAND Corp., *Reporters on the Battlefield: The Embedded Press System in Historical Context* xiii (2004).

[6] *Id.* at 55.

allows confirmation that the military is acting in accordance with American values and laws."[7]

Indeed, because the Executive enjoys the greatest latitude in matters of foreign affairs, the press serves a particularly critical function when reporting on wartime activities. As Justice Stewart explained:

> [T]he only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government. For this reason, it is perhaps here that a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment.

N.Y. Times Co. v. United States, 403 U.S. 713, 728 (1971) (Stewart, J., concurring).[8]

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[7] *Id.* at 22; *see also* U.S. Joint Chiefs of Staff, Joint Pub. 3-61, *Public Affairs* at I-7 (2005) ("Commanders have an obligation to inform the American public about their nation's military."), *available at* http://www.dtic.mil/doctrine/jel/new_pubs/jp3_61.pdf.

[8] Justice Stewart's views were not unique. First Amendment scholar Zechariah Chaffee wrote that the role of the press "is especially important in wartime." Zechariah Chafee, *Free Speech in the United States* 33 (1941).

> Truth can be sifted out from falsehood only if the government is vigorously and constantly cross-examined, so that the fundamental issues of the struggle may be clearly defined, and the war may not be diverted to improper ends, or conducted with an undue sacrifice, of

Current military policy recognizes the indispensable role that the press plays in informing the public and ensuring that the war effort retains democratic legitimacy.[9] The current policy of the Department of Defense is to provide the media with "long-term, minimally restrictive access to U.S. air, ground, and naval forces" by "embedding" journalists

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life and liberty, or prolonged after its just purposes are accomplished.

Id.; see also N.Y. Times, 403 U.S. at 717 (Black, J., concurring) (discussing role of press when soldiers are sent "off to distant lands to die of foreign fevers and foreign shot and shell").

[9] The military's past attempts to restrict press access during the invasions of Grenada and Panama provoked strong criticism from both the civilian leadership and the Pentagon itself. *See* 129 Cong. Rec. 299,04 (1983) (Senate resolution condemning denial of press access in Grenada); *A Statement of Principle on Press Access to Military Operations*, N.Y. Times, Jan. 11, 1984, at A10 (statement of major media organizations in response to restrictions on press access in Grenada); Chairman of the Joint Chiefs of Staff Media Relations Panel, Final Report (1984) ("The American people must be informed about the United States' military operations . . . . [T]he panel believes it is essential that the U.S. news media cover U.S. military operations to the maximum degree possible consistent with mission security and the safety of U.S. forces"); Fred S. Hoffman, *Review of the Panama Pool Deployment, December 1989*, Memorandum for Correspondents, The Pentagon, Washington, DC, March 1990.

with U.S. troops.[10] In adopting the embed policy, the Pentagon noted that "[o]ur ultimate strategic success in bringing peace and security to this region will come in our long-term commitment to supporting our democratic ideals. We need to tell the factual story—good or bad—before others seed the media with disinformation and distortions . . . ."[11] The Army Field manual similarly warns "that the perception of America's Army and how it conducts its operations can be as important to the Army's success as actual combat."[12]

In addition to "embedded" reporters, other journalists will often be present in areas of military conflict or dispersed among civilian populations. The Army Field Manual on Public Affairs Operations advises soldiers that "[t]here is no question that the news media will cover future military operations, and in most cases will be on the ground before American forces arrive."[13] Members of the various Judge Advocate General Corps are also trained to expect frequent interactions between the military

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[10] *See* U.S. Dep't of Defense, *Public Affairs Guidance on Embedding Media* § 2A (2003) *available at http://www.defenselink.mil/news/Feb2003/d20030228pag.pdf* Even more broadly, commanders are encouraged to "organize for and facilitate access of national and international media to U.S. forces, including those engaged in combat operations." *U.S. Joint Chiefs of Staff, Joint Pub. 3-61, supra* note 7, at III-23.

[11] *Guidance on Embedding Media, supra* note 10, at § 2A.

[12] Army Field Manual 46-1, *supra* note 4 at 12 (1997).

[13] *Id.* at 24.

and the media. A recent article by two Air Force JAG officers advises that "[t]he reality of the world in which judge advocates find themselves today is such that they must expect and plan for encountering large numbers of news media representatives in all phases of deployment—including actual hostilities."[14]

In evaluating the government's jurisdictional arguments, this Court should similarly anticipate that the government's detention policies in Iraq and in future areas of conflict will impact journalists and other civilians. As this Court recognized in *Hamdi*, journalists and war correspondents face a "very real" risk of erroneous military detention in the absence of sufficient due-process protections. *See Hamdi*, 542 U.S. at 530 (plurality opinion).

II. The Current War in Iraq Has Been Particularly Dangerous for Journalists.

The current war in Iraq illustrates the enormous dangers that journalists face in carrying out their professional responsibilities. The ongoing conflict has resulted in more journalist deaths than any conflict in the 20th Century, according to figures compiled by the Committee to Protect Journalists and the Freedom Forum. Almost twice as many journalists have died in the line of duty in Iraq than were killed in World War II or Vietnam. Reporting from the middle of an urban war zone, journalists—along with their translators and other media-support

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[14] Major Lisa L. Turner & Major Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 Air Force L. Rev. 1, 12 (2001).

workers—face harassment and attacks from Iraqi insurgents, local government officials, kidnappers, and masked gunmen. Journalists have been caught in the crossfire of terrorist attacks, abducted as hostages, or murdered to silence their reporting. *See* Sam Dagher, *Iraqi Media Brave Assault From All Sides*, Christian Science Monitor, Dec. 20, 2007.[15]

The fog of war can also make it difficult for U.S. troops to distinguish between journalists and enemy forces. Journalists run the risk that their cameras will be mistaken for rocket-propelled grenades, *see* Sherry Ricchiardi, *Dangerous Assignment*, American Journalism Review Vol. 27, Issue 6 (Dec. 1, 2005); that they will be confused with Iraq insurgents, *see* Slobodan Lekic, *Reuters TV Soundman Killed in Baghdad, Cameraman Wounded*, AP Worldstream, Aug. 28, 2005; or that they will be suspected of being spies for foreign governments, *see Two Israeli Journalists Detained By U.S. Troops in Iraq*, AP Worldstream, Mar. 28, 2003.

U.S. troops have detained dozens of journalists and media-support workers in Iraq. While the majority of these journalists have been released within days without charges, over a dozen others have been held for months or as long as two years

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[15] More than 125 journalists and 50 media-support workers have been killed in Iraq since the war began in 2003. 32 journalists died in the year 2007 alone. Indeed, for the past five years in a row, more journalists have been killed in Iraq than in any other place in the world. Statistics collected by the Committee to Protect Journalists can be found at http://www.cpj.org/Briefings/Iraq/Iraq_danger.html.

without any charges or a meaningful hearing. These journalists include:

- Majed Hameed, a correspondent working for Reuters and Al-Arabiya, who was detained by U.S. troops for four months, from September 2005 to January 2006. *See* Eric Schmidt, *2,000 More M.P.'S Will Help Train the Iraqi Police*, N.Y. Times, Jan. 16, 2006, at A1 (noting that "Majed Hameed, an Iraqi reporter for the Al Arabiya network and Reuters, was released after four months in custody").

- Ali Mashhadani a freelance photographer for Reuters, who was detained for five months, from August 2005 to January 2006. *See News Agency Shocked By Imprisonment of Cameraman at Baghdad's Abu Ghraib*, AP Worldstream, Aug. 31, 2005.

- Samir Mohammed Noor, a television cameraman for Reuters, who was detained for eight months, from May 2005 to January 2006. *See U.S. Military Releases Freelance Cameraman from Prison in Iraq After 8 Months*, AP Worldstream, Jan. 22, 2006.

- Cyrus Kar, a freelance documentary filmmaker from the United States, who was detained for two months, from May 2005 to July 2005. *See* Tim Golden, *How a Trip to Film in Iraq Ended in a Military Jail Cell*, N.Y. Times, July 24, 2005.

- Abdul Ameer Younis Hussein, a cameraman for CBS news, who was detained for over a year, from April 2005 to April 2006. He continued to be detained by U.S. troops for months even after the Iraqi criminal court declined to prosecute him. *See* Robert F. Worth, *Detention of Iraqi Employees Angers Western News Media*, N.Y. Times Sept. 15, 2005, at A8. An Iraqi court eventually acquitted Hussein, citing a lack of evidence. *See* Vanessa Arington, *Iraqi Court Acquits CBS Cameraman for Lack of Evidence*, AP Worldstream, Apr. 5, 2006.

- Ammar Daham Naef Khalaf, a reporter from Agence France-Presse, who was detained by U.S. troops for six months, from April 2005 to October 2006. *See AP Photographer is Latest in a Long List of Detainees*, CPJ News Alert, Dec. 7, 2007, *available at* http://www.cpj.org/news/2007/mideast/iraq07dec07na.html.

The current detention of AP photographer Bilal Hussein has received the most extensive criticism from the American media and human-rights groups. Bilal Hussein is a Pulitzer Prize winning photojournalist who has worked with the AP since 2004. On April 12, 2006, Hussein was seized by U.S. forces in Ramadi, the capital of Iraq's Anbar province. He has been detained by U.S. troops in Iraq for nearly two years and, since early December 2007, has been undergoing an investigative hearing in an Iraqi court. *See* Tim Arango, *Case Lays Bare*

the Media's Reliance on Iraqi Journalists, N.Y. Times, Dec. 17, 2007; Lori Hinnant, *U.S. Detainees Sent To Iraqi Courts for Trial Face Legal System Mired in War's Chaos*, Associated Press, Dec. 6, 2007.

Given the important public interests they serve, the prolonged detention of journalists raises special concerns. When soldiers are forced to make split-second judgments in a chaotic and unpredictable urban conflict, it is inevitable that mistakes will sometimes be made. But because quick decisions must be made on the battlefield with little time for reflection, it is critical that detainees be promptly afforded a meaningful hearing before a neutral decisionmaker so they have an opportunity to demonstrate their civilian status or rebut the allegations against them.[16]

III. The Government's Proposed Jurisdictional Rule Would Pose an Unacceptably High Risk of Erroneous Detention in Current and Future Military Conflicts.

The government urges this Court to apply *Hirota v. MacArthur*, 338 U.S. 197 (1949), to bar all inquiry into military detentions by U.S. troops engaged as

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[16] As this Court noted in *Hamdi*, "initial captures on the battlefield need not receive the process we have discussed here; that process is due only when the determination is made to *continue* to hold those who have been seized." *Hamdi*, 542 U.S. at 534 (plurality opinion); *Cf. County of Sacramento v. Lewis*, 523 U.S. 833, 851 (1998) (noting the "different circumstances of normal pretrial custody and high-speed law enforcement" and explaining that government officials are held to a higher standard of care "when actual deliberation is practical").

part of an international military force or acting pursuant to the judgment of an international tribunal. These jurisdictional rules—which are nowhere expressed in the Constitution or any statute—would categorically foreclose all judicial relief for journalists and other civilians detained on the basis of mistaken identity or military error.

This Court has repeatedly rejected the government's attempts to insulate its military detentions and trials from judicial review. Most recently, when the government litigated the *Hamdi* case in the lower courts, it "submit[ted] that [courts] may not review at all its designation of an American citizen as an enemy combatant—that its determinations on this score are the first and final word." *Hamdi v. Rumsfeld*, 296 F.3d 278, 283 (4th Cir. 2002). The Fourth Circuit correctly rejected that argument—both in its first appeal, and again when the *Hamdi* case returned to the Fourth Circuit in 2003. As Judge Wilkinson explained at the time: "The duty of the judicial branch to protect our individual freedoms does not simply cease whenever our military forces are committed by the political branches to armed conflict." *Hamdi v. Rumsfeld*, 316 F.3d 450, 464 (4th Cir. 2003), *vacated on other grounds*, 542 U.S. 507 (2004).

Yet the government now proposes a jurisdictional rule that would undercut *Hamdi* and effectively strip many future military detainees of all due-process protections. Whenever it is operating as part of an international alliance or in concert with a local government, the military would be able to detain and punish free of any judicial review.

Indeed, the vast majority of U.S. military activities already take place under the auspices of some international coalition or alliance. According to the Army Field Manual, the United States "normally pursues its national interests through multinational operations—those conducted by alliances and coalitions."[17] The President's National Security Strategy similarly makes clear that the United States will continue to use multinational coalitions to address the most pressing threats, especially global terrorism.[18] Such concerted multinational action is prevalent not only in areas of international armed conflict—such as Iraq today or Bosnia in the 1990s—but also in humanitarian, peace-building and peacekeeping operations spanning the globe. Today, U.S. forces are actively engaged as part of United Nations peacekeeping missions in areas including Liberia, Ethiopia and Eritrea, Haiti, Georgia, Kosovo, and the Middle East,[19] and they are deployed together with NATO allies in ongoing

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[17] Army Field Manual 1 ¶¶ 3-11 (2005), *available at* http://www.army.mil/fm1. A 2001 Report by the RAND Corporation likewise noted that "[t]he Army Vision recognizes explicitly that in future operations, Army forces will perform missions as part of a larger joint-combined-multinational force." Thomas S. Szayna, *et al.*, RAND Corp., *Improving Army Planning for Future Multinational Coalition Operations*, xi (2001).

[18] The National Security Strategy of the United States of America 14 (2006), *available at* http://www.whitehouse.gov/nsc/nss/2006/nss2006.pdf.

[19] United Nations Department of Peacekeeping Operations, Current Operations, Facts and Figures, *available at* http://www.un.org/Depts/dpko/dpko/.

operations and missions in Afghanistan, Kosovo, and Darfur.[20]

The government's interpretation of *Hirota* would block judicial review of military detentions for all these operations. The jurisdictional bar would strip judicial protection from journalists, war correspondents, medical personnel, humanitarian relief workers, United Nations staff, civilian engineers, and other civilians who could potentially be detained by U.S. troops. Civilians initially detained as a result of military error could be held permanently without charges or summarily transferred into the custody of local authorities who may provide little or no due process protection or engage in torture or other violations of humanitarian law.

The government's concerns about deference to military operations and international comity can and should be taken into account in fashioning the scope of the relief available to detainees. *Cf. In re Yamashita*, 327 U.S. 1, 30 (1946) (Murphy, J., dissenting); *Johnson v. Eisentrager*, 339 U.S. 763, 797 (1950) (Black, J., dissenting). But those concerns do not justify the creation of rigid jurisdictional rules that foreclose judicial review altogether. As this Court warned in *Hamdi*, "history and common sense teach us that an unchecked system of detention carries the potential to become a

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[20] The North Atlantic Treaty Organization, Current Operations and Missions, *available at* http://www.nato.int/.

means for oppression and abuse." *Hamdi*, 542 U.S. at 530 (plurality opinion). [21]

The government's proposed application of *Hirota* would create the same type of "unchecked system of detention" that *Hamdi* found constitutionally unacceptable. The practical consequences of such a jurisdictional bar would be devastating for journalists who may be detained while performing their professional duties in areas of military conflict. Nothing in Article III prevents the judiciary from hearing their claims.

CONCLUSION

For the foregoing reasons, the D.C. Circuit's decision in *Geren v. Omar*, No. 07-397, should be affirmed and its decision in *Munaf v. Geren*, No. 06-1666, should be vacated and remanded for further proceedings.

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[21] Because the habeas petitioners in this case are American citizens, this Court need not determine whether and to what extent non-U.S. citizens detained in Iraq are protected by federal habeas statutes and the Constitution. *See Rasul v. Bush*, 542 U.S. 466, 483 n.15 (2004); *Johnson v. Eisentrager*, 339 U.S. 763, 798 (1950) (Black, J., dissenting) (citing *Hirota v. MacArthur*, 338 U.S. 197, 199 (1949) (Douglas, J., concurring)).

Respectfully submitted,

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